

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *RG* *DC*
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VICTOR LIPFORD,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

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No. 04-2857-D/P

THOMAS H. GOULD
CLERK, U.S. DISTRICT COURT
W.D. OF TN, MEMPHIS

ORDER TO SHOW CAUSE

On October 26, 2004, Plaintiff Victor Lipford, Bureau of Prisons (BOP) inmate registration number 07157-084, an inmate now housed at the Federal Correctional Institution (FCI) in Bennettsville, South Carolina, filed a complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80, and paid the filing fee. On November 15, 2004, the Court directed that Plaintiff effect service of process upon the Defendant. The Clerk issued and mailed summonses to Plaintiff on December 3, 2004.

United States Magistrate Judge Tu Pham entered a scheduling order on March 14, 2005. Plaintiff filed a deposition notice on July 14, 2005. He filed a notice of change of address on September 15, 2005, and requested that his motion deadline be extended due to his transfer and being in transit for approximately two months, from July 15, 2005 until September 8, 2005. The Court granted the motion on September 21, 2005.

This document entered on the docket sheet in compliance
with Rule 58 and/or 79(a) FRCP on *12/14/05*

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The Plaintiff has failed to effect service of process as directed by the Court's order entered on November 15, 2004. Plaintiff is not proceeding as a pauper and is not entitled to have the marshal serve the defendants under 28 U.S.C. § 1915(d). Plaintiff was advised of his duty to effect service and has not complied with the Court's order. The Court's order advised the Plaintiff in part that:

Failure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice.

Additionally, Federal Rule of Civil Procedure 4(m) provides:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

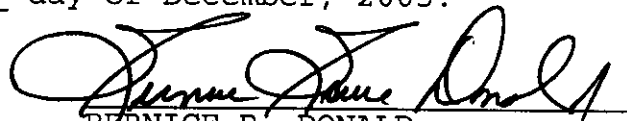
The Court's review of the Clerk's file reveals that Plaintiff has not served the Defendant within 120 days after the filing of this complaint. He did not file a motion for an extension of time to serve the defendants within the 120 days of the Court's entry of the order.¹ Lipford has clearly not complied with the Court's order entered on November 15, 2004, to serve the defendant.

¹ The summonses mailed to the plaintiff on December 3, 2004, were not returned as undeliverable to the Clerk. Furthermore, although plaintiff notified the Court that he was in transit from July 15, 2005 until September 8, 2005, he was not in transit during the 120 days period after the summonses were mailed.

Absent a showing of good cause to justify a failure to effect timely service, the Fed. R. of Civ. P. 4(m) mandates dismissal. See Byrd v. Stone, 94 F.3d 217, 219 (6th Cir. 1996); Moncrief v. Stone, 961 F.2d 595, 596 (6th Cir. 1992). The legislative history of Rule 4(m) and Sixth Circuit case law suggest that good cause can be shown only where the defendant has intentionally evaded service. Friedman, 929 F.2d at 1157; United States v. Gluklick, 801 F.2d 834, 835-37 (6th Cir. 1986); 128 Cong. Rec. H30, 929, 30, 933 n. 20 (1982).

Accordingly, the plaintiff is hereby ORDERED to show cause within 20 days of the entry of this order upon the docket why the claims against the defendant should not be dismissed for failure to obtain service. Failure to respond to this order or to show good cause will result in the dismissal of this complaint.

IT IS SO ORDERED this 13th day of December, 2005.


BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 12 in case 2:04-CV-02857 was distributed by fax, mail, or direct printing on December 14, 2005 to the parties listed.

Victor W. Lipford
07157-084
P.O. Box 52020
Bennettsville, SC 29512

Honorable Bernice Donald
US DISTRICT COURT